Filed 5/28/19 Miller v. Miller CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

KELLEY MILLER, Plaintiff and Appellant, v. KEVIN MILLER, Defendant and Respondent.	A153682 (Mendocino County Super. Ct. No. SCTM-CVDV-17-69277)

A year after filing her petition for divorce, appellant Kelley Miller sought a Domestic Violence Restraining Order ("DVRO") against her husband, respondent Kevin Miller. The trial court denied the request, a decision Kelley[1] appeals, citing "multiple incidents of physical aggression" and "emotional abuse." Having reviewed the record, we find no abuse of discretion in the trial court's decision not to issue a DVRO and accordingly affirm.

BACKGROUND

The parties met in 2010, married in 2011, and had a child in 2014. The incidents Kelley cites in support of her request for a DVRO arose out of disagreements between the parties over caring for their daughter.

February 2015 Door Knob Incident. One evening in February 2015, after the baby had gone to bed, the parties were arguing in the kitchen about their daughter's

[1] To avoid confusion because they share a last name, and meaning no disrespect to the parties, the court refers to appellant and respondent by their first names.

safety. As Kelley describes it, the argument "became increasingly heated between the two of us. Husband left the kitchen and went into the guest bedroom where he closed the door. I followed and opened the door. Husband was standing in the door frame and was trying to push the door closed. He continued to push on the door and demand that I get out of the entrance to the door. I was standing in the doorway and had my hand on the door as well in order to keep it open. Husband continued to try to close the door. Husband became so irate that he pushed me with both of his hands with a huge amount of force. Husband is nearly a foot taller than me and outweighs me by approximately sixty pounds. He pushed me backwards about four feet and I landed against the opposite wall where there is a door that is an entrance to the garage. My left buttock hit the doorknob with great force," causing pain and then a bruise. (Underscoring omitted.)

Kevin offered a slightly different version of events, which the trial court credited, according to which Kelley pursued Kevin into the guest room even after Kevin retreated there and closed the door behind him. "Kevin was trying to extricate himself from the argument and Kell[e]y was refusing to relent." Kevin acknowledged that his use of force on that occasion, even in an effort to be left alone, was inappropriate, and he apologized. "[T]here was no excuse for me to have pushed you and I am very sorry that it happened . . . . That won't happen again," he wrote in an email to Kelley. There were, however, subsequent incidents.

May 2015 Arm-Pushing Incident. On an evening in May 2015 the parties again got in an argument in the kitchen over caring for their daughter. Kelley recounts that, with arm outstretched, she pointed toward the baby's bedroom, making a point. Kevin pushed her arm "down and out of the way," then walked out of the room. He used enough force to cause Kelley's arm to go down to her side, and enough force to prompt her warning that if he ever did that again she would call the police. With regard to this argument, the trial court again credited Kevin's version of events, finding that Kevin moved Kelley's arm when she "was actively thwarting Kevin's attempts to disengage by blocking the door."

Thirteen months later, on June 2, 2016, Kelley filed for divorce.

February 2017 Elbowing Incident. While the divorce was pending, the parties continued to share a home, and they operated on an informal schedule for alternating custody time. One day in February 2017, after Kevin had bathed their little girl, she slipped and fell, splitting her lip. Kevin picked her up and, although the toddler was crying for her mother, attempted to prevent Kelley from taking the girl out of his arms. Kevin was, as Kelley described it, flapping his elbow to ward her off, making contact with her chest several times as she reached for the child. After a few minutes, realizing that the little girl was indeed bleeding in the mouth, Kevin handed her over to Kelley and left the house. Kevin "denied ever trying to ward [Kelley] off with his elbows," and the trial court credited his testimony.

March 2017 Bathroom Incident. One day in March, Kevin followed his daughter into the bathroom, where he saw Kelley on the toilet. She told him to leave and he did, but lingered in the hallway to watch his daughter. He later explained that he did not want to leave the girl during his custody time. The trial court concluded that "[t]o portray this encounter as anything more than an accident" reinforced the impression that Kelley's complaints "of abusive behavior were exaggerated."

May 2017 Pancake Incident. One morning in May 2017, Kevin made pancakes for the family, but he burned them. Kelley picked the charred bits off their daughter's pancake, and her own, and put the burnt pieces on the table in a way that offended Kevin. Kevin and Kelley took turns shoving the charred pancake bits around the table, until Kevin balled them up and threw them clear across the kitchen. The burnt pancake pieces flew within six to twelve inches of the toddler's head, according to Kelley. Kevin described his conduct as more that of a basketball player who overshot in lobbing the pancake bits toward the sink, testifying that they never came anywhere near the toddler. The trial court was "unable to find that either party's account of this incident clearly preponderates."

Citing all of these incidents, Kelley sought a DVRO to keep Kevin away from her and from their toddler daughter. After moving into a local hotel where her sister was staying for a visit, Kelley filed her request for temporary and permanent orders. The trial

court denied the ex parte request for a temporary restraining order on June 9, 2017 but, finding the parties' living situation untenable, soon ordered Kevin to move out of the family home. The court gave Kelley exclusive use of the parties' home and primary custody of their daughter, issuing interim custody orders that required all exchanges to occur at the Fort Bragg Police Department.

June 2017 Shouting Incident. The last incident of which Kelley complains occurred immediately after the parties' first hearing in the DVRO case. Kevin was briefly pro per and Kelley's lawyer telephoned him to talk about a child custody plan. According to Kelley's lawyer and Kelley's sister, Kevin was hostile and shouting so loudly during the last minute and a half of this telephone call that the attorney had to hold the phone away from her ear.

At the close of a two-day evidentiary hearing the trial court took the matter under submission, then issued a tentative decision that it later adopted as its final statement of decision. Citing the "totality of the evidence" and having "weighed the credibility of the parties," the trial court denied Kelley's request for a DVRO. The trial court concluded the parties' "verbal arguments, although sadly unproductive and volatile, do not rise to the level of abuse. Nor does the incidental physical contact that resulted during these volatile interactions constitute abuse within the meaning of Family Code § 6203." For example, with regard to the door knob incident the trial court "credit[ed] Kevin's statements that Kell[e]y was overcome with anger . . . and that she pursued Kevin into the guest bedroom despite Kevin's obvious desire to retreat and be left alone." Characterizing Kelley's account of the incident as "exaggerate[d]," the trial court concluded that "under the circumstances of the moment, Kevin's pushing her out of his way was sufficiently restrained so as not to cross the threshold into excessive force and/or abuse." Similarly, with regard to the arm-pushing incident, the court found it was not abuse for Kevin to move Kelley's arm so that he could retreat from their argument. Nor was it abusive for Kevin to put his elbows out and turn away from Kelley as she tried to take their daughter from his arms.

Kelley timely appealed the trial court's denial of the DVRO.

DISCUSSION

Kelley makes two primary arguments in this appeal. First, because there was no allegation that she was assaulting Kevin or that he needed to defend himself from physical attack, she argues the trial court erred in applying *In re Marriage of G.* (2017) 11 Cal.App.5th 773 (*Marriage of G.*), a case that affirmed denial of a DVRO because the acts of alleged abuse were committed in defense of self and property. Second, she argues the trial court misapplied the law in discounting the abuse she suffered as not serious enough to warrant a DVRO because the law does not recognize gradations of abuse, nor require a threshold level of physical conduct.

"On appeal, a judgment of the trial court is presumed to be correct," meaning that if the "judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) "We may not disturb a court's ruling on a request for a DVRO absent an abuse of discretion." (*Marriage of G.*, *supra*, 11 Cal.App.5th at p. 780.) This means that we will reverse the judgment only if the circumstances of the case, "viewed most favorably in support of the decision," are such that "the decision exceeds 'the bounds of reason,' " and no judge could "reasonably have reached that decision under applicable law." (*Cahill v. San Diego Gas & Electric Co.*, *supra*, 194 Cal.App.4th at p. 957.)

Kelley's appeal fails this test. With regard to her first challenge, we agree with Kelley—and with the trial court—that there are factual differences between this case and *Marriage of G.*, because in that case the petitioner instigated the physical grappling. (*Marriage of G.*, *supra*, 11 Cal.App.5th at p. 777.) But we disagree with Kelley that in applying this precedent the trial court made "a finding that . . . anytime someone speaks . . . in an elevated tone or continues a verbal argument, the other individual in that disagreement may employ an act of abuse to stop that argument." The trial court made no such categorical statement and no error of law in considering the context for Kevin's limited use of force. Rather the judge evaluated the "totality of the evidence" to reach a case-specific determination that *these* facts did not justify a DVRO.

We see no abuse of discretion in that judgment. First, the trial court characterized Kevin's conduct as "incidental physical contact" during "volatile interactions" between the parties. Second, as to the first and second incidents alleged, which are the only two in which Kelley asserts that Kevin instigated physical contact, the trial court found that the volatile interactions occurred in the context of Kevin attempting to retreat from the parties' arguments. The record provides substantial evidence in support of both these factual findings. Third, Kelley's allegations describe a pattern of de-escalating seriousness, where the only two acts involving any physical force against her occurred more than two years before she filed for the DVRO. "The length of time since the most recent act of abuse is not, by itself, determinative," but the court is required to "consider the totality of the circumstances" (Fam. Code, § 6301, sub. (c)), and the passage of time is certainly relevant.

The decision whether to issue a DVRO is forward-looking, although informed by respondent's past conduct. The purpose of a DVRO "is to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence." (Fam. Code, § 6220.) To achieve this purpose, "[a]n order *may* be issued" where the evidence shows "reasonable proof of a past act or acts of abuse." (Fam. Code, § 6300 (italics added); see also *Marriage of G.*, *supra*, at p. 779.) The statute defines "abuse" broadly, including for example any act that "disturb[s] the peace of the other party" (Fam. Code, §§ 6203, 6320), but the statute does not mandate a DVRO any time a petitioner has proven any past act that falls within this broad definition. Rather, the court must exercise judgment in deciding whether, once a past act of abuse is proven, the circumstances of the case suggest that a restraining order could help prevent future acts of domestic violence or abuse. (See Fam. Code, §§ 6220, 6300; *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1288.) We find no abuse of discretion in the trial court's determination that no abuse sufficient to warrant a DVRO occurred in this case. The context for and the limited extent of the parties' physical confrontations, together with the fact that none had occurred in two years made it reasonable for the trial court to conclude no DVRO was necessary.

Kelley's second argument fails for a similar reason. Kelley is correct that "abuse" may be emotional rather than physical. (See, e.g., *Altafulla v. Ervin* (2015) 238 Cal.App.4th 571; *In re Marriage of Evilsizor & Sweeney* (2015) 237 Cal.App.4th 1416.) But if the law does not recognize "gradations of abuse" as such, it does recognize that not every past act that the statute defines as abuse necessitates a DVRO. The statute gives the trial court broad discretion to determine whether, in a particular case, a DVRO would promote the purpose of the Domestic Violence Prevention Act. (Fam. Code, §§ 6200–6460.) Courts regularly and properly employ that discretion to issue DVROs protecting victims of abuse. In this case, the trial court issued custody orders in the parties' divorce case to address the issue that provoked their repeated conflicts. After hearing testimony for two days the trial court concluded that Kelley's allegations of abuse were exaggerated, and that Kevin's use of physical force had been incidental to his efforts to deescalate their arguments. Under the circumstances, we find no abuse of discretion in the court's decision not to issue a DVRO.

DISPOSITION

The order is affirmed. Respondent shall recover his costs on appeal.

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TUCHER, J.

WE CONCUR:

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STREETER, Acting P. J.

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BROWN, J.

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